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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, ex rel. GILBERT WATERS AND HENRY WATERS,

Petitioners,

vs.

PETER BENSINGER, Director of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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VS.

PETER BENSINGER, Director of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Gilbert Waters and Henry Waters, pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this case.

ORDER BELOW

The order of the United States Court of Appeals for the Seventh Circuit, an "Unpublished Order" pursuant to Circuit Rule 28, is printed in the Appendix (App. 1) to this petition. The opinion of the District Court for the Northern District of Illinois is not reported.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on January 31, 1974. A timely petition for rehearing was denied on March 28, 1974. This petition is filed within 30 days of that date. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Where petitioners presented an alibi defense, and defense counsel timely requested an instruction as to the proper consideration of such evidence by the jury, and where the State Appellate Court originally reversed and remanded, but later withdrew its opinion, substituting another based upon an Illinois Supreme Court case adopting (without statement of reasons) the position of Illinois Pattern Jury Instructions that no alibi instructions should be given, may the federal court, on a habeas writ, decline to interfere with the state court judgment upon the stated reason that "federal judges are not the guardians of the guardians of state law"?

2. Is not refusal to instruct the jury upon the proper consideration to be given a defense of alibi tantamount to leaving the lay jurors free to follow their personal, possibly misconceived notions regarding this defense, and does not such refusal, therefore, deprive the accused of that fair trial required by due proecss of law as guaranteed by the Fourteenth Amendment?

3. Is not the right to present one's theory of defense to the jury under proper instructions (such as that refused in the case at bar) of constitutional dimension so as to merit federal protection from state infringement, whether judged in terms of the reasonable doubt require-

ment of *In re Winship*, 397 U.S. 358, or as required by "'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Cupp* v. *Naughten*, ... U.S. ....., 38 L.Ed.2d 368, 375?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "... [N]or shall any state deny any person of ... liberty ... without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him. ..."

ISSUES PRESENTED

The questions presented by this petition, which involve the refusal of a state court in violation of then-applicable state law to instruct the jury upon defense request upon the defense of alibi, also invoke the supervisory power of this Court insofar as the District Court's and the Court of Appeals' refusal to reach the merits is concerned.

STATEMENT OF THE CASE

This petition seeks review of an order of the United States Court of Appeals for the Seventh Circuit, affirming the District Court's dismissal of petitioners' petition for a writ of habeas corpus.

In February of 1970, petitioners Gilbert Waters and Henry Waters (hereafter, petitioners) were convicted

after a jury trial. In an opinion filed August 25, 1971, the Illinois Appellate Court reversed and remanded the convictions on the ground that the trial court had erroneously refused to grant petitioners' request to instruct the jury on the law applicable to the defense of alibi. Upon petition for rehearing by the State, the Appellate Court withdrew its previous opinion, and substituted therefor another opinion filed November 18, 1971 (reported at 275 N.E.2d 472) affirming the convictions. Petitioners' other contentions were adversely decided in both opinions. The basis for the court's change of position on the alibi instruction issue was an Illinois Supreme Court case, *People* v. *Poe,* 48 Ill.2d 506, 272 N.E.2d 28 (1971). Although the Illinois Supreme Court's opinion in *Poe* was filed on May 27, 1971, the decision was not called to the Appellate Court's attention until *after* the first Appellate Court opinion had been filed. In *Poe,* the Illinois Supreme Court overruled *sub silentio* a long line of prior decisions requiring that an alibi instruction be given where the evidence warrants it, thereby adopting the position of Illinois Pattern Jury Instructions (I.P.I. Crim. 24.05) that no instruction concerning the treatment of alibi evidence be given.

After the Appellate Court's second opinion affirming petitioners' convictions, their petition to the Illinois Supreme Court for leave to appeal was denied.

Petitioners' petition for a writ of habeas corpus was originally dismissed by the District Court on July 31, 1972. Upon their motion for reconsideration, the District Court on October 31, 1972 adhered to its original order dismissing the petition.

Petitioners remain incarcerated for 20 to 30 years.

REASONS FOR GRANTING THE WRIT

1.

Petitioners were denied their right to a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution when the State Trial Court refused to instruct the jury as to the law applicable to their defense of alibi, since due process of law requires that the jury be instructed as to defendants' theory of the case. The District Court and Court of Appeals erroneously concluded to the contrary.

Fundamental fairness as embodied in the due process clause of the Fourteenth Amendment demands that a defendant in a criminal case be permitted to have his theory of the case properly submitted to the jury for decision.

While not deciding the exact issue, this Court has spoken on a similar issue, wtih language supportive of petitioners' position. In *Holt* v. *Virginia*, 381 U.S. 131, 14 L.Ed.2d 290 (1965), this Court for the first time held that compulsory process for defense witnesses (an essential portion of Sixth Amendment right to confrontation) was required to be provided in state criminal proceedings as a requirement of due process. As part of its rationale for so holding, this Court stated:

> "[D]ue process guarantee[s] a defendant . . . 'an opportunity to be heard in his defense — a right to his day in court — . . .' The right to be heard must necessarily embody a right to raise relevant issues." 381 U.S. at 136, 14 L.Ed.2d at 293.

Such a constitutional right to "raise relevant issues" and "to be heard in his defense" must necessarily also include the right to have the finder of fact properly instructed as to the law applicable to those issues in order fully to exercise that right.

The fundamental right to have submitted to the jury any theory of the defense raised by evidence in the record has long been recognized both by federal and Illinois decisions.

See, *e.g.*, *United States* v. *Phillips*, 217 F.2d 435, 440-41 (7 Cir. 1955). In that case, defendant unsuccessfully sought to have the jury instructed that if he acted in good faith, on advice of counsel, the jury should acquit. The appeals court agreed and reversed and remanded, holding that where the evidence supports the defense theory, defendant has a right to have the jury instructed on that theory. In *Calderon* v. *United States*, 279 Fed. 556, 558 (5 Cir. 1922), the reviewing court held that where the evidence presents a defense theory and the court's attention is called to it, it is reversible error for the court to refuse to instruct the jury thereon. In *United States* v. *Grimes*, 413 F.2d 1376, 1378 (7 Cir. 1969), the court reversed and remanded where defendant unsuccessfully sought to have the jury instructed on his theory of the case, which was the defense of another to justify an alleged assault on a prison guard. The court held:

> "[D]efendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous."

The questions presented by this petition are indeed the reverse of the coin of those involved in *Mullaney* v. *Wilbur*, ... U.S. ....., 39 L.Ed.2d 96 (1974). There, this

Court must have recognized that an instruction specifically not requiring the State to prove malice aforethought in a murder prosecution, but requiring defendant to establish lack of malice aforethought, could be violative of federally guaranteed due process of law. The Court granted certiorari (under No. 72-1462, on January 14, 1974), and remanded for reconsideration by the Court of Appeals in the light of an intervening state court decision explaining the history and meaning of the law in question.

In the case at bar, the Illinois court's justification for failure to give the requested alibi instruction was merely adoption by Illinois of the Pattern Jury Instructions formulated by a Judicial Committee recommending that no instruction on the subject be given.

Where, as here, the instruction which was not given would have clarified to the jury that once the physical possibility of defendant to perpetrate the offense is put in question by presentation of an alibi defense, the burden is on the State to establish his presence at the time and place of the crime, then failure to give that requested instruction amounts to permitting the State to obtain a conviction without proving an essential element of the offense—*i.e.*, that it *was* physically possible for the accused to have committed the crime. With a defense in such lay disrepute as "alibi," we submit, it is essential that the jury overtly be reminded of this continuing burden upon the State. Failure so to do thus amounts to permitting defendant to be convicted in violation of due process of law.

Until the Illinois Supreme Court's decision in *People* v. *Poe*, 48 Ill.2d 506, 272 N.E.2d 28 (1971), Illinois courts had recognized a fundamental right to have the jury instruct-

ed on any defense theory of the case supported by the evidence. In *People* v. *Matter,* 371 Ill. 33, 20 N.E.2d 600 (1939), the court held:

> "When there is evidence in the record, . . . the defendant . . . [is] entitled to have the jury instructed as to the law applicable to any state of facts shown by the evidence . . . We are not called upon to judge the weight of the evidence upon this question, as very slight evidence upon a given theory of the case will justify the giving of an instruction." 20 N.E.2d at 602.

In *People* v. *Lefler,* 38 Ill.2d 216, 230 N.E.2d 827, 830 (1967), and in *People* v. *Routt,* 100 Ill.App.2d 388, 241 N.E.2d 206, 209 (4 Dist. 1968), the courts specifically recognized that the defendant is entitled to an instruction on his theory of the case.

Until *Poe, supra,* Illinois courts had specifically applied the above doctrine to alibi cases; where the evidence supported defendant's theory of alibi, a requested instruction concerning the law applicable to such evidence, particularly concerning the state's burden of establishing a defendant's presence at the scene of the crime beyond a reasonable doubt, was absolutely required.

In *People* v. *Scott,* 401 Ill. 80, 81 N.E.2d 426 (1948), the court reversed and remanded because the trial court refused to instruct the jury concerning defendant's alibi defense. In holding that such instruction was required, the Court stated:

> "[Defendant is] entitled to have the jury instructed not only as to the law applicable to any state of facts testified to by him, but applicable to any state of facts which the jury might legitimately find from the evidence to have been proved." 81 N.E.2d at 429-30.

Accord, People v. *Morris,* 90 Ill.App.2d 208, 234 N.E. 2d 52 (1 Dist. 1967); *People* v. *Collins,* 49 Ill.2d 179, 274 N.E. 2d 77, 82-83 (1971).

The federal courts are similarly in accord with the principle that where the evidence raises an alibi defense, the jury must be instructed as to the government's burden of proof concerning the alibi. Both federal manuals on criminal jury instructions contain such an instruction. Mathes & Devitt, Federal Jury Practice and Instructions, sec. 8.27, at 110 (1965); LaBuy, Jury Instructions in Federal Criminal Cases, sec. 5.01, at 25 (1965).

In *United States* v. *Marcus,* 166 F.2d 497 (3 Cir. 1948), two witnesses testified at trial that defendant was elsewhere at the time the offense was committed. The court reversed, holding:

> "[I]nstructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, are not enough in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time. If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt. . . . [Even if defendant's proffered instruction was improper], since an instruction on the issue was requested, it was the court's duty to itself compose and give a proper instruction on the subject." *Id.* at 503-04.

Accord, United States v. *Barrasso,* 267 F.2d 908, 910-11 (3 Cir. 1959). Another alibi instruction which has received approval is contained in *Goodall* v. *United States,* 180 F.2d 397, 401-02 (D.C. Cir. 1950), as follows:

> "There has been testimony to the effect that the defendant was not present at the time and place when this homicide was committed. The defense of alibi is a legitimate, legal, and proper defense. The evidence adduced in support of this defense, like all the other evidence in the case, should be given such weight and such consideration as you may think it entitled to under all the facts and circumstances of the case.
>
> "If, after a full and fair consideration of all the facts and circumstances in evidence, you find the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time and place of the commission of the offense charged in the indictment, then one of the essential elements of the offense is lacking, and it will be your duty to find the defendant not guilty." *Id.* at 402.

We are not suggesting that any particular form of alibi instruction is required by due process. What we are submitting is that where, as here, evidence of alibi is in the record, and where, as here, defense counsel requested an alibi instruction,[1] fundamental fairness requires that such evidence properly be submitted to the jury as petitioners' theory of the case, together with a proper statement of applicable law concerning the prosecution's burden of proof as to that issue. To give no instruction whatever

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[1] See *Naughten* v. *Cupp,* 476 F.2d 845, 846 n.1 (9 Cir. 1973), reversed by *Cupp* v. *Naughten,* ..... U.S. ....., 38 L.Ed.2d 368 (1974).

concerning alibi where the evidence supports this defense amounts to denial of petitioners' due process right to have their theory of the case properly presented to the jury.

Nor is petitioners' failure to include a specific requested instruction fatal to their claim that a proper instruction should have been given, for the State trial court made it perfectly clear that no alibi instruction would be given. When defense counsel requested that an alibi instruction be given, the court refused to permit counsel to submit any specific instruction, stating that no instruction on the subject would be given at all, based upon the Committee Comments to I.P.I. Crim. 24.05. (Abst. filed in State appeal, p. 27, Trial Tr. p. 351) The court noted that counsel could argue the matter of alibi to the jury.

However, that counsel was permitted to argue the law concerning the defense of alibi to the jury does not cure the prejudice ensuing from the court's refusal to give an alibi instruction. Argument unsupported by instructions from the court lacks that ring of authenticity which amplifies argument on a legal issue validated, as it were, in the mind of the jury by instructions on that issue. This was recognized by the court in *United States* v. *Phillips,* 217 F.2d 435 (7 Cir. 1955), where, in reversing for failure to instruct on the defense that defendant acted on advice of counsel, the court stated:

> "An argument to a jury, however, on a legal issue, unsupported by an instruction to which the defendant was entitled, constitutes an aggravation rather than a mitigation of the harmful effect of the court's refusal to instruct."

Federal habeas corpus is a proper method by which to test the constitutional validity of a State trial court's charge to the jury. In *United States ex rel. Powell* v.

Pennsylvania, 294 F.Supp. 849 (E.D. Pa. 1968), *app. dismissed,* 425 F.2d 367 (3 Cir. 1970), the court stated, "An allegation of impropriety in the charge to the jury entitles a state prisoner to federal habeas corpus relief only where it is shown that it constituted fundamental error resulting in a deprivation of due process." 294 F.Supp. at 851. In that case the court concluded that failure to charge the jury as to the lesser included offense of involuntary manslaughter would constitute such fundamental error if there had been some evidence to support such a verdict; however, since the court found no such evidence in the record, relief was denied. *Id.* at 852. Other cases holding that instructions to the jury are cognizable by habeas corpus where the error complained of rendered the trial fundamentally unfair in violation of due process include *Higgins* v. *Wainwright,* 424 F.2d 177, 178 (5 Cir. 1970), and *Shepherd* v. *Nelson,* 432 F.2d 1045, 1046 (9 Cir. 1970).

Federal cases granting habeas corpus because of improper instructions to State juries regarding alibi include *Stump* v. *Bennett,* 398 F.2d 111 (8 Cir. 1968); *Johnson* v. *Bennett,* 414 F.2d 50 (8 Cir. 1959); *State* v. *Smith,* 321 F.Supp. 482, 488, 490 (N.D. Ga. 1970), *Smith* v. *Smith,* 454 F.2d 572 (5 Cir. 1972); and *Mathis* v. *Caldwell,* 455 F.2d 979 (5 Cir. 1972).

While these cases granted habeas corpus in state criminal cases on the ground that the alibi instruction given may have improperly shifted the burden of proof to the defendant, they also necessarily recognize that proper jury consideration of the alibi defense is essential to a fair trial.

It must be remembered that laymen tend to view alibi evidence, particularly when testified to by members of a defendant's family, with great distrust and skepticism. Without being advised specifically that the alibi evidence could be sufficient in law to raise a reasonable doubt of petitioner's guilt, the jury may not have realized this. Especially in such a case as the instant case, where the nature of the crime charged was repulsive, violent and malicious, it is of extreme importance that the jury be properly instructed regarding alibi. (See Point 3, *infra*)

We submit that in this case failure to instruct on the defense of alibi at all was as repugnant to due process as giving such erroneous instructions as were stricken by the federal courts in the cases cited above. *Cf. Screws* v. *United States,* 325 U.S. 91, 89 L.Ed. 1495 (1945).

Giving no alibi instruction can be just as violative of due process of law as giving a faulty one, in that the jury is left to conjecture and surmise as to the treatment it should afford the alibi evidence, and the defendant's theory of the case, which he has a fundamental right to present to the jury, is in effect not presented at all. *Cf. Cutshall* v. *Tollett,* 318 F.Supp. 1330 (E.D. Tenn. 1970).

Proper alibi instructions are necessary in order to implement the presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt. As the court stated in *Smith* v. *Smith,* 454 F.2d 572, 579 (5 Cir. 1972):

> "Habeas corpus will not lie to challenge a jury charge in the absence of a clear denial of due process so as to render the trial fundamentally unfair. Higgins v. Wainwright, 5th Cir. 1970, 424 F.2d 177; McDonald v. Sheriff of Palm Beach County, Florida, 5th Cir. 1970, 422 F.2d 839. In light of these principles, there is yet no doubt that a shift in the burden of proof

> of an essential element of the crime does rise to constitutional proportions and renders the trial fundamentally unfair. *The presumption of innocence and the harsh burden of proof placed on the State in criminal prosecutions are two of the oldest and most fundamental rights protected by our Constitution.* See, e.g., Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895). They purport to protect all citizens from the threat of punishment by mistake. They are therefore far too important and fundamental to be classified as less than constitutionally protected. See Deutch v. United States, 367 U.S. 456, 81 S.Ct. 1587, 6 L.Ed.2d 963 (1961); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934); Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1966)." (Emphasis added.)

Although the State in the *Smith* case had argued that since the jury had been given a standard "proof beyond a reasonable doubt" instruction which, according to the State, adequately protected these rights, the Court in *Smith* decided that it could not "second-guess" the jury; since no proper alibi instruction was given, habeas corpus was held to lie:

> "As noted by the Eighth Circuit in Stump, this Court cannot determine with precision where the jury in any particular case placed the burden of proof. This does not prevent this Court from exercising its collective common sense in the instant case. Accordingly, we must presume that prejudice resulted." *Id.* at 578.

Cf. Cool v. *United States,* 409 U.S. 100, 34 L.Ed.2d 335 (1972), where this Court held that an improper accomplice testimony instruction rendered defendant's trial fundamentally unfair, even though other, proper general instructions regarding the presumption of innocence and burden of proof were given.

We respectfully urge that the State of Illinois' decision not to instruct on alibi evidence, based only upon a Committee's recommendation later adopted by the Illinois Supreme Court (*People* v. *Poe,* 48 Ill.2d 506, 272 N.E.2d 28 (1971)), operated to deprive petitioners of due process of law in that they were precluded from having their theory of the defense fairly submitted to the jury. We request this Court to issue the writ reviewing the order of the Seventh Circuit, and to direct that court to issue a writ of habeas corpus and order petitioners discharged unless, within a reasonable specified time, the State affords them a new trial at which they will have their day in court (*Holt* v. *Virginia,* 381 U.S. 131, 136, 14 L.Ed.2d 290, 293 (1956)) and an opportunity to present their defense to the jury, as is their federally guaranteed due process right.

2.

The State Appellate Court's decision affirming petitioners' convictions depended upon giving retroactive effect to People v. Poe, 48 Ill. 2d 506, 272 N.E. 2d 28 (1971), decided after petitioners' trial; this deprived petitioners of their fundamental right, secured by Fourteenth Amendment due process of law, to have their cases decided under controlling law in existence at the time of their trial.

After petitioners' convictions were first reversed, on rehearing they were affirmed, based on *People* v. *Poe,* 48 Ill. 2d 506, 272 N.E. 2d 28 (1971). *Poe* was decided on May 27, 1971. Petitioners were convicted in February of 1970.

Pre-*Poe* Illinois law specifically required that, where there was any evidence supporting an alibi defense, it was reversible error not to give an instruction on the subject of alibi. This line of decisions was consistent for a long period of time prior to *Poe.* For example, in *People* v. *Scott,* 401 Ill. 80, 81 N.E. 2d 426, 429-30 (1948), the Illinois

Supreme Court reversed and remanded because the trial court refused to instruct the jury concerning defendant's alibi defense. *Accord, People* v. *Collins,* 49 Ill. 2d 179, 274 N.E. 2d 77, 82-83 (1971); *People* v. *Morris,* 90 Ill. App. 2d 208, 234 N.E. 2d 52 (1 Dist. 1967) (Abst. only).

Moreover, under Illinois law (and under federal decisions as well; see Point 1, p. 6, *supra*), petitioners are entitled to a "theory of the case" instruction if there is any evidence in the record which could conceivably support their theory of the case. *People* v. *Matter,* 371 Ill. 33, 20 N.E. 2d 600 (1939); *People* v. *Lefler,* 38 Ill. 2d 216, 230 N.E. 2d 827, 830 (1967); *People* v. *Routt,* 100 Ill. App. 2d 388, 241 N.E. 2d 206, 209 (4 Dist. 1968).

As was pointed out in Point 1, p. 8, *supra,* prior to *Poe,* under the doctrine of the above-cited cases, where any evidence supported a defendant's theory of alibi, an instruction concerning the law applicable to such evidence, particularly concerning the State's burden to prove defendant's presence at the scene of the crime beyond a reasonable doubt, was absolutely required.

Pre-*Poe* law, requiring that an alibi instruction be given, was in effect at the time of petitioners' trial and convictions. While not expressly overruling any prior cases, *Poe sub silentio* overruled *all* such cases insofar as an alibi instruction was concerned. To apply *Poe* to petitioners' trial so as thus to condone the trial court's failure to instruct on alibi amounts to giving retroactive effect to *Poe.* Such effect should not have been given to *Poe* by the appellate court. Giving it such effect, by affirming petitioners' convictions, amounts to depriving defendants of yet another fundamental right—the right to have their cases decided under controlling law existing at the time of their trial.[2]

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[2] This is particularly true where, as here, the "controlling law" concerned a fundamental right. See Point 1, *supra.*

We urge this Court to rule that *Poe* should not have been given retroactive effect to justify affirming petitioners' convictions under these circumstances. Giving *Poe* retroactive effect to petitioners' trial and convictions constitutes a further and additional denial of their right to a fair trial. They were entitled to be tried according to standards then prevailing in Illinois under decisional law, and they were not so tried.

Many recent "overruling" decisions—that is, judicial decisions which, like *Poe*, overturn a long line of case law to the contrary—have been held not to be retroactive. For example *Mapp* v. *Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081 (1961), overruling a long line of cases which had held that illegally seized evidence was nonetheless admissible in state criminal proceedings, was held not retroactive in *Linkletter* v. *Walker*, 381 U.S. 618, 14 L.Ed. 2d 601 (1965).

Escobedo v. *Illinois*, 378 U.S. 78, 12 L.Ed. 2d 977 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), overruling a series of holdings and announcing that confessions taken in absence of counsel or without giving appropriate warnings concerning constitutional rights are inadmissible, were held not retroactive (specifically, held not applicable to trials begun before their dates of decision), in *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L.Ed. 2d 882 (1966).

Lee v. *Florida*, 392 U.S. 378, 20 L.Ed 2d 1166 (1968), which overruled earlier cases and held that evidence obtained in violation of a federal wiretapping statute is inadmissible in state criminal proceedings, was held not retroactive in *Fuller* v. *Alaska*, 393 U.S. 80, 21 L.Ed. 2d 212 (1968).

Katz v. *United States,* 389 U.S. 347, 19 L.Ed. 2d 576 (1967), overruling a long line of cases and holding that electronic eavesdropping is unconstitutional even without physical trespass, was held not retroactive in *Desist* v. *United States,* 394 U.S. 244, 22 L.Ed. 2d 248 (1969), and *Kaiser* v. *New York,* 394 U.S. 280, 22 L.Ed. 2d 274 (1969).

McCarthy v. *United States,* 394 U.S. 459, 22 L.Ed. 2d 418 (1969), holding that Rule 11 of F.R.Cr.P. must be strictly complied with, and failure so to do is reversible error, overruling prior cases, was held not to be retroactive (that is, it was held applicable only to guilty pleas accepted after *McCarthy's* decision) in *Halliday* v. *United States,* 394 U.S. 831, 23 L.Ed 2d 16 (1969).

Thus, there is considerable authority supporting the proposition that an overruling decision affecting substantial rights should not be given retrospective effect.

We believe we have already sufficiently demonstrated to this Court that failure to give an alibi instruction deprived petitioners of substantial rights—namely, their right to a fair trial. We have also demonstrated that, under state law in existence at the time of their trial, an alibi instruction was required to be given, and that the trial court erred, under then existing law, in refusing to give the alibi instruction to the jury where there was some evidence of record supporting the defense of alibi. We further believe that, in addition to those matters already presented to this Court in support of petitioners' position, petitioners were further deprived of substantial constitutional rights by application to their case by the appellate court of the *Poe* decision as the sole basis for affirmance, where that case had not yet been decided at the time of their trial, and where it is clear that *Poe* overruled a long and unbroken line of Illinois decisional law upon which petitioners had a right to rely. *Cf. Gelpcke* v. *Dubuque,* 1 Wall. 175, 17 L.Ed. 520 (1864).

3.

The District Court and the Court of Appeals used an improper standard to justify affirmance. Rather than determining for itself (as it should have) that under applicable analogous authorities petitioners' claim does indeed rise to due process proportions, because no controlling authority specifically so stated each court chose not to recognize such right, and indulged in the luxury of declining to dictate its views to the state courts for the purported reason that petitioners' claim did not rise to due process proportions. In the exercise of its supervisory power, this Court should review the decision so as to encourage the federal courts to recognize legitimate due process claims as such on habeas corpus petitions although no controlling authority may at the time so require.

Both the District Court and the Court of Appeals erroneously concluded that petitioners' claim did not rise to constitutional dimension, *i.e.*, that it did not reach due process proportions. Petitioners have demonstrated in Points 1 and 2, *supra*, that it did.

The Court of Appeals, mistakenly characterizing the defense of alibi as other than an "exculpatory defense,"[3]

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[3] The court characterized "alibi defense" as not being an "exculpatory defense," inasmuch as it is merely a method of disproving the prosecution's case. (App. 3) But the two (a defense which is "exculpatory," and a method of proof which tends to disprove the prosecution's case) are not opposites. For example:

"Exculpatory. Clearing or tending to clear from alleged fault or guilt." Black's Law Dictionary 675 (4th ed. 1957).

"Exculpatory—proving or tending to prove guiltless; exculpating." American Heritage Dictionary of the English Language 458 (3rd printing 1970).

"Exculpate—to clear of a charge, prove guiltless or blame-

wrongly decided that the state trial court's failure to instruct the jury upon alibi did not deprive petitioners of any right preserved against State encroachment by the Fourteenth Amendment. Therefore, while clearly indicating its disapproval of the Illinois procedure of uniformly refusing to instruct the jury upon this defense, the court declined to impose its views upon the State.

Because an alibi defense may of itself serve to raise a reasonable doubt of a defendant's guilt in the mind of the trier of the facts, it is essential that the fact-finder understand its import.

Moreover—and this point was not touched on by the court, though raised in the Briefs and argued on appeal—because of the generally unsavory reputation of an "alibi" among lay persons, particularly if the alibi is supported only by the testimony of friends or relatives of the defendants, it is essential, in order that defendants may have the jury give due consideration to their alibi defense, that the jury appropriately be instructed by the court.

Justifying its conclusion by analogy to various cases holding that issues involving state trial court instructions do not usually involve federal constitutional issues (App.

(Footnote continued)

less; exonerate." *Ibid.*

"Exculpatory—tending or serving to exculpate." Webster's Seventh New Collegiate Dictionary 290 (1972).

"Exculpate—to clear from alleged fault or guilt." *Ibid.*

In other words, an exculpatory defense is one which—like an alibi defense—tends or serves to clear one from alleged guilt, regardless of whether or not this is accomplished by tending to disprove the prosecution's evidence that defendant committed the offense.

2-3), the court ignores the realities of a jury's consideration of an alibi defense as well as the clear directive that:

> "[D]ue process guarantee[s] a defendant . . . 'an opportunity to be heard in his defense—a right to his day in court—. . .' The right to be heard must necessarily embody a right to raise relevant issues." *Holt* v. *Virginia*, 381 U.S. 131, 136, 14 L.Ed. 2d 290, 293 (1965).

The Court also failed to grasp the import of *In re Winship*, 397 U.S. 358, 364, 25 L.Ed.2d 368, 375 (1970), where this Court "explicitly" held

> "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

As we have demonstrated, where an alibi defense is presented, the physical possibility of the accused's presence at the time and place of the crime necessarily becomes one such fact, and the jury must therefore be so instructed.

The court's disapproval of the Illinois procedure of blanketly refusing to give alibi instructions is clear from the language of its order; however, believing the matter not to rise to due process proportions, the court declined to intervene. (App. 3) When considered in its proper perspective, blanket refusal to instruct juries upon the law applicable to the defense of alibi, as is presently practiced by the courts of Illinois, amounts to a denial of the fundamental due process right to be heard in one's defense.

Under the factual posture of the case at bar, such right is of constitutional dimension so as to merit federal protection from state infringement, whether judged in terms

of the reasonable doubt requirement of *In re Winship, supra,* or as required by " 'some principle of justice so rooted in the traditions and conscience of our people so as to be ranked as fundamental.' " *Cupp* v. *Naughten,* ..... U.S. ....., ..., 38 L.Ed.2d 368, 375 (1974), quoting from *Snyder* v. *Massachusetts,* 291 U.S. 97, 105, 78 L.Ed. 674, 677 (1934).

Had the District Court and the Court of Appeals independently searched its collective conscience, they would have determined that despite the absence of any authority expressly requiring such holding, petitioners' claims did indeed rise to constitutional dimension and due process proportions. Such determination is clear from the preceding arguments in this Petition.

In the exercise of its supervisory power, this Court should review the instant decision so as to encourage the lower federal courts to recognize legitimate due process claims as such on habeas corpus petitions although no controlling authority may at the time so require. The decisions of the District Court and Court of Appeals in the case at bar demonstrate that those courts declined so to act.

While jurisdiction must be present, courts should not bend over backwards to decline to find it when it is there. Petitioners' claim in the case at bar is within the federal jurisdiction, and should have been recognized and vindicated.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the order of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
Heard October 15, 1973—Decided January 31, 1974

Before
Hon. Roger J. Kiley, Senior Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Charles E. Wyzanski, Jr., Senior District Judge*

UNITED STATES OF AMERICA, Ex. Rel. GILBERT WATERS and HENRY WATERS,
Petitioners-Appellants,

No. 72-1966 vs.

PETER BENSINGER, Director of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 C 1297
James B. Parson, Judge.

ORDER

Appellants seek reversal of the district court's denial of their petition for a writ of habeas corpus. They unsuccessfully claimed in the district court that their rights under the due process clause of the Fourteenth Amendment were denied by the Illinois state trial court which had convicted them of armed robbery. Appellants' prin-

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*Senior District Judge Charles Edward Wyzanski, Jr., of the District of Massachusetts, is sitting by designation.

cipal ground for seeking reversal is that the state court refused their request to instruct the jury on their defense. Appellants' subsidiary point is that in their case the state court changed the judicial rule with respect to alibis, and in their view this constituted a constitutionally impermissible retroactive law.

In the state criminal trial court, appellants offered without let or hindrance evidence respecting an alibi and also arguments to the jury in support of their defense of an alibi. But the trial judge, though asked to do so, did not instruct the jury on the defense of alibi. The Illinois appellate court, as a matter of state law, first reversed the convictions because of the trial judge's failure to give an alibi instruction, but that court on rehearing withdrew its opinion and affirmed the convictions. *People* v. *Waters*, 2 Ill. App.3d. 429, 275 N.E. 2d. 472 (2d Dist.. App. 1972)

The initial question is whether there is any merit to the suggestion that a state violates the due process clause of the federal constitution when it changes the rule of substantive law by a judicial opinion contrary to the state court's earlier judicial views. Such a change is not a retroactive law of the type prohibited by the federal constitution, and the state is as free by judicial opinion to change its criminal as its civil law, irrespective of the effect of the change upon cases pending in a lower state court. Cf. *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965); *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S 358, 364-365 (1932)

The second and main question is whether as a matter of federal constitutional law the Illinois state convictions deny due process because the state judge failed to give an alibi instruction. No authority precisely in point has been drawn to our attention. But as a matter of principle, and as a matter of analogy, we are clear that the failure of the state court's trial judge to give the alibi instruction

does not involve a point of such fundamental nature in the pursuit of justice as to merit protection by the Fourteenth Amendment. "Normally . . . instructions to the jury on state trials are matters of state law and procedure not involving federal constitutional issues." *Grundler* v. *State of North Carolina*, 283 F.2d 798, 802 (4th Cir., 1960) See *Kearney* v. *Peyton*, 360 F.2d 589 (4th Cir., 1966); *Greyson* v. *Com. of Kentucky*, 333 F.2d 583 (6th Cir., 1964); *McDonald* v. *Sheriff of Palm Beach County*, 422 F.2d 839 (5th Cir., 1970) There is no reason in this case not to follow the cited analogies. Logically, an alibi is not an exculpatory defense; it is merely a method of disproving the prosecution's case. Some have thought it difficult to frame instructions on the alibi defense without confusing the jury on the major principle that the government has the burden of proof of every essential element of the crime charged. Indeed the Illinois Judicial Conference [Illinois Pattern Jury Instructions, Criminal, 24.05 (Chicago, 1968)] seems to have had this view. While we as federal judges may not be overwhelmingly impressed with this Illinois state view, it is not our direct concern to tell state judges how to instruct juries. Reasonable differences in state practice, whether founded on confidence or lack of confidence in the capacity of trial judges and juries, are permissible under the federal constitution. Except in extreme cases we federal judges are not the guardians of the guardians of state law.

Ex majore cautela we observe that, unlike *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir., 1968) *Johnson* v. *Bennett*, 414 F.2d 50 (8th Cir., 1969), and *Smith* v. *Smith*, 454 F.2d 572 (5th Cir., 1972), this case does not present the question whether it is constitutionally permissible to instruct the jury that the defendant must bear the burden of proving an alibi—an instruction which has the effect of shifting from the prosecution to the defense the burden of proof.

Judgment affirmed.

Petition for Rehearing denied on March 28, 1974.